

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

95299  
60590

FILE: B-181702

DATE: February 27, 1975

MATTER OF: Brady's Reporting Service

**DIGEST:**

1. IFB failed to clearly state whether transcript copies were to be sold to general public on F.O.B origin or destination basis. However, protester's uniformly and substantially higher prices on other undisputed items create such a remote possibility that protester's competitive position was prejudiced by this ambiguity as not to warrant disturbing award.
2. Contracting officer's determination that low bidder met solicitation requirement that it be regularly engaged in the performance of the services being procured was not shown to have been incorrect.
3. Allegations of improprieties in specifications must be filed prior to bid opening to receive formal consideration by GAO. 4 C.F.R. § 20.2(a) (1974 ed.); 52 Comp. Gen. 20 (1972).

Invitation for bids (IFB) CPSC-B-75-12-SBSA was issued as a small business set-aside on May 31, 1974, by the Consumer Product Safety Commission, contemplating a requirements contract for stenographic reporting services for Fiscal Year 1975. A contract pursuant thereto was awarded on June 28, 1974, to Miller-Columbian Reporting Service as the low responsive, responsible bidder.

The record indicates that following the opening of bids on June 21, both the low bidder and the protester (the second low bidder) were requested to confirm their bid prices pursuant to Federal Procurement Regulations (FPR) § 1-2.406 (1964 ed.) since both were considerably lower than the range of other bids, indicating the possibility of an error. After replying in writing to such request (and there is no indication that the protester alleged a mistake in its bid), the protester states that he became cognizant of "further facts" that may have affected his bid and those of others. The protester states that he attempted to discuss such matters with the contracting officer but that such communications were unsatisfactory. Consequently, a formal protest was filed, and the contracting agency states that such protest was received 4 days subsequent to award.

Under the terms of the IFB, the contractor had two basic obligations. The first was to provide transcription services and to deliver "FOB destination" copies of transcript, classified according to the urgency with which they were required as "ordinary" (10-day), "three-day", "daily" or "rush" copy. The contractor's second obligation was to sell additional copies of transcript to the Commission, certain persons designated by it, and the general public. The protester's initial contention is concerned with this second obligation.

The protester alleges that in response to an oral inquiry prior to bid opening, it was advised by the contracting officer that the IFB's Article IV, "DELIVERY F.O.B. DESTINATION", applied to sales of transcript copies to the general public, and the protester bid accordingly. It was the protester's understanding that Miller-Columbian's bid on sales to the general public was on an F.O.B. origin basis, and that that firm was being permitted after award to revise its prices to an F.O.B. destination basis.

The Commission reports that Miller-Columbian was not permitted to change its bid after award. Additionally, the contracting officer states that she does not recall advising the protester as alleged. Even so, we think there is some merit to the protester's contention.

With regard to the contractor's obligation to furnish the general public with copies of the transcript, we note that Article IV of the IFB states that the contractor is to "fill" the public's requests. Article VII authorizes the contractor to "sell" transcript copies; states that the contractor will normally perform the Government's function of making copies of transcript "available" to the public; and imposes penalties if the contractor fails to "provide" copies of transcript at the prices listed in the Schedule. We have been informed by the Commission that its intent was that transcript copies would be sold to the general public on an F.O.B. origin basis. We do not think that intention was clearly expressed in the IFB.

The question which is then presented is whether Brady's competitive position was prejudiced by the failure of the IFB to clearly state whether copies were to be sold to the public on an F.O.B. origin or F.O.B. destination basis. We do not know what Brady would have bid under different circumstances. However, we note from the abstract of bids that Brady consistently bid higher than Miller-Columbian, even on items as to which Brady does not claim to have been misled. Miller-Columbian's prices were substantially below those of the other seven bidders for Items 2(a)

through (d) and 3, additional copies for sale to the general public. We note, for example, that even if Brady were given the advantage of Miller-Columbian's lower prices on these items, Brady's evaluated bid still would be \$899.75 above Miller-Columbian's evaluated bid. Although we agree with Brady's contention that the IFB was deficient, we think Brady's uniformly higher pattern of bidding would have precluded it from displacing Miller-Columbian as the low bidder even if Brady had bid differently on Items 2 and 3. We therefore regard the possibility of prejudice as so remote as not to warrant our disturbing the award.

We note that with regard to this contention, as well as several others, the protester alleges that he obtained clarification of the IFB's provisions through telephone conversations with the contracting officer prior to bid opening. The contracting officer generally denies making the statements attributed to her. This situation illustrates the importance of adherence to the requirements of paragraph 3 of Standard Form 33A (March 1969 ed.), made a part of the instant IFB, which provides in part that:

"Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation \* \* \* must be requested in writing and with sufficient time allowed for reply to reach offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding. \* \* \*"

Moreover, our Office has required that protests based upon alleged improprieties in solicitations, which are apparent prior to bid opening, must be filed prior thereto in order to be considered timely filed. See 4 C.F.R. § 20.2(a) (1974 ed.). As noted at 52 Comp. Gen. 20, 22 (1972), we deem it inappropriate for a bidder to first allege that there is an impropriety in an IFB after bids have been opened and his competitors' prices exposed.

The protester then refers to the section of the IFB entitled "Bidders Qualifications," wherein it is stated, inter alia, that to be considered for award, a bidder must be regularly engaged in the performance of the items specified. Protester states his belief that the low bidder is primarily engaged in the operation of a limousine service and only incidentally in stenographic reporting services. However, the Commission reports that it has determined that the low bidder is regularly engaged in the performance of stenographic reporting services and had held at least


three prior Government contracts therefor. We believe that the contracting officer's determination that the low bidder met this specific requirement of the IFB has not been shown to have been incorrect.

The protester next contends that another bidder (other than the low bidder) was not a small business and yet its bid was "accepted and abstracted" even though the instant procurement was a small business set-aside. The Commission replies, and we believe properly, that all timely bids are "accepted" in the sense of being opened and abstracted, and that the process of evaluation of such bids for price, responsiveness and the bidder's responsibility is a separate and distinct procedure. Therefore, there was no impropriety in opening and abstracting a bid from a concern which at a later stage in the evaluation conceivably could have been found not to be a small business.

The protester then objects to Article I, paragraph 1-C, of the specifications, claiming it to be improper in the light of recent decisions of our Office. In this regard, 4 C.F.R. § 20.2(a) (1974 ed.) requires that protests against improprieties in specifications be raised prior to bid opening in order to receive consideration. We will not consider this allegation in view of its untimely filing.

Protester also seeks clarification of Article VII (c) of the IFB and what it considers to be a contradiction between Articles XI and XIII thereof. Again we must conclude that since the protester failed to seek written clarification of these provisions prior to bid opening, or to protest any alleged improprieties in the IFB prior to the opening of bids and revelation of prices, such allegations are not timely filed under 4 C.F.R. § 20.2(a) (1974 ed.) and are not for consideration on their merits.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States